obtained after calling for tenders; particularly as the defendants themselves offered $610 a month.

II. The defendants submitted that by reason of Section 30 of the Civil Procedure Code, the plaintiffs could not recover anything more than mesne profits, because no other claim can be joined with a claim for the recovery of immovable property without leave of the Court and no such leave was given.

The defendants tendered evidence to show that the profits of the business carried on by them on the land premises amounted to $600 during the period from October, 1938, to March, 1939.

But, as was rightly pointed out to me on behalf of the plaintiffs, those profits are the profits of the business, and not of the property claimed: "mesne profits" are defined in Section 2 of the Code to include profits which the person in wrongful possession might with ordinary diligence have received therefrom, and there is no reason why the defendants should not have obtained, as the plaintiffs did obtain, a rent of $610 for the land and premises."

That being so, it is not necessary for me to consider whether the claim falls within clause (b) of Section 30 of the Code (damages for breach of a contract under which the property was held), or whether the leave of the Court was given by implication.

I hold that damages are correctly based on an average rental of $610 a month for a period of 6 years. As I have no evidence as to the probability of the value increasing or decreasing during those 6 years, I must presume that the value remains constant at $610 a month.

I therefore assess the damages at the rate of $610 a month from the 1st October, 1938, until delivery of possession, and I order the defendants to pay such damages to the plaintiffs.

Judgment accordingly.

Solicitors for plaintiffs—*Braddell Bros.*

Solicitors for defendants—*M. Ismail.*

[ORIGINAL CIVIL JURISDICTION]

MILLS, J.

May 24, 1938.

THE STATE OF JOHORE.....Applicant

vs.

ESTATE & TRUST AGENCIES (1927) LTD., MALACCA, THE LEGAL PERSONAL REPRESENTATIVES OF LEE AH TIN AND 3 ORS.....Respondents

[JOHORE BAHRU LAND REFERENCE No. 1 of 1938]

Land Enactment—Powers of Commissioner on enquiry under Section 54—Small Estates Enactment, 1936—Hearsay evidence, whether admissible—Adverse possession.

On a reference made to the Court by the Commissioner of Lands & Mines under Section 22 of the Land Enactment, the following opinions were expressed as *obiter dicta, viz*: (1) The powers of the Commissioner under Section 54 to adjudicate on an agreement for sale are not affected by the Small Estates Enactment, 1936; (2) Hearsay evidence in proceedings before the Commissioner may be accepted only in the circumstances permitted by the Evidence Ordinance; (3) The Commissioner may take cognisance of an interest claimed by virtue of long possession for a period exceeding 12 years in order to extinguish the title of the registered owner and to give a title to the person in possession.

REFERENCE UNDER LAND ENACTMENT.

Abdul Hamid, Deputy Public Prosecutor for Applicant.

H. R. S. Zehnder for 1st Respondent.

F. R. N. Massey for 2nd Respondent.

MILLS, J.—In this proceeding the Commissioner of Lands refers for the direction of the Court three questions regarding the exercise of his powers when enquiring into an application under Section 54 of the Land Enactment. In order to save time, trouble and expense, I determined the application by virtue of Section 22, but the Commissioner desires me to state my opinions as to his questions for his future guidance.

These opinions are, of course, *obiter dicta*.

The first question is this.

"Whether his powers extend to adjudicating on an agreement for sale."

It is quite clear that before the passing of the Small Estates Enactment, 1936, the Collector had power under Section 42 to register a person as the owner of land (other than land held under grant or lease) where that person based his claim on an agreement for sale. It is also clear that the Commissioner had power, under Section 54, to register any interest in land, besides ownership, even when the land was held under grant or lease.

But the Small Estates Enactment, 1936, restricted the powers of the Collector by withdrawing from him the power to register a person as owner when that person claimed by succession to a deceased proprietor or by virtue of an agreement for sale.

That Enactment did not, however, expressly amend Section 54 of the Land Enactment: and its effect on that Section is open to some doubt.

The one view is that since Section 54 was not expressly amended, the powers of the Commissioner are not affected.

The other view may be expressed as follows:—

(a) the powers of the Commissioner either are not affected, or else are restricted by withdrawing from his cognizance cases in which the applicants' claim is based either on succession to a deceased proprietor or on an agreement for sale;

(b) it is the clear intention of the Small Estates Enactment that all claims based on succession to a deceased proprietor should be determined under that Enactment;

(c) therefore, by necessary implication, claims based on an agreement for sale are also withdrawn from the cognizance of the Commissioner.

To that view one might reply, however:—

I. If the Legislature had intended to curtail the powers of the Commissioner, they would have done so in express words.

II. The Legislature may have considered that even if they left in the hands of the Commissioner the theoretical power to determine applications based on succession to a deceased proprietor, he would in practice decline to adjudicate

(a) because it is the intention of the Small Estates Enactment that such applications should be dealt with under that Enactment, and

(b) because it is a general principle that legal proceedings should be brought in the lowest competent Court.

And the Legislature may further have considered that since Section 54 was not expressly amended, the powers of the Commissioner to adjudicate on agreement for sale was not affected.

I find the matter somewhat difficult to decide. On the whole I incline to the view that there is a slight doubt whether the Legislature intended to amend Section 54 by necessary implication.

I therefore held that the Legislature did not intend to amend Section 54, and I hold that the Commissioner may still adjudicate on an agreement for sale.

The second question is this.

"Whether he may accept hearsay evidence of the existence of an agreement for sale, alleged to have been destroyed or lost."

My answer is that since the proceedings before the Commissioner are judicial proceedings before a person legally authorized to take evidence, they are subject to Section 2 of the Evidence Ordinance: therefore, he may accept hearsay evidence only under circumstances in which it is permitted by that Ordinance.

The third question is this.

"Whether he may take cognizance of an interest claimed by virtue of long possession for a period exceeding 12 years in order to extinguish the title of the registered owner and to give a title to the person in possession."

My answer is in the affirmative: since, although the registered owner has the right to possession, yet if he relinquishes that right for 12 years and allows an adverse party to retain possession for that period, he is barred by the Limitation Enactment from suing for possession if the defence of limitation is set up; he is therefore prohibited from enforcing his right. In adopting this view, I follow the Legislature of the Colony, who by Ordinance No. 10 of 1929, enacted that at the end of the limitation period the right and title of the person out of possession were extinguished.

Order accordingly.

Solicitors for 1st Respondent—
Zehnder Bros.

Solicitors for 2nd Respondent—
Allen & Gledhill.